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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,

Petitioners,

v.

FEDERAL POWER COMMISSION and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TOWN OF CORNWALL and VILLAGE OF CORNWALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Sierra Club and its Atlantic Chapter hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 22, 1971 in the case entitled *Scenic Hudson Preservation Conference, et al.* v. *Federal Power Commission, et al.*, in which the Sierra Club and its Atlantic Chapter were petitioners.

Opinions Below

The opinion of the Court of Appeals, which is officially reported at 453 F.2d 463, is set forth in the appendix to the petition for certiorari, filed simultaneously herewith, by Scenic Hudson Preservation Conference, et al (the "Scenic Hudson petition"). A copy of the opinion and order of the Federal Power Commission is filed as a separate appendix to the Scenic Hudson petition. An earlier licensing order in the same matter was set aside and the proceedings remanded to the Commission in *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 346 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), a copy of which is also set forth in the appendix to the Scenic Hudson petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 22, 1971. Timely applications for rehearing *en banc* were denied by an evenly divided court on November 26, 1971. The time within which an application for certiorari might be made was extended by Mr. Justice Marshall to and including March 25, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1251(1) and the Federal Power Act, §313(b), 16 U.S.C. §8251(b).

Questions Presented

Petitioners The Sierra Club and its Atlantic Chapter hereby beg leave to incorporate by reference the statement of the questions presented set forth in the Scenic Hudson petition.

Statutes Involved

This petition involves §§101 and 102 of the National Environmental Policy Act [42 U.S.C. §§4331-4332] and §10 (a) of the Federal Power Act [16 U.S.C. §803(a)]. The text of each of the said statutes is set forth in the Scenic Hudson petition.

Statement

Petitioners The Sierra Club and its Atlantic Chapter hereby beg leave to incorporate by reference the Statement set forth in the Scenic Hudson petition.

Reasons for Granting the Writ

Petitioners The Sierra Club and its Atlantic Chapter beg leave to incorporate by reference the reasons for granting the writ set forth in the Scenic Hudson petition, and respectfully set forth the following additional reasons.

1. A number of recent developments render it essential that this Court review the decision of the court below and provide a definitive interpretation of the mandates of the National Environmental Policy Act ("NEPA"). These developments include the conflicts between and within the Courts of Appeals and between District Courts, cited and discussed in the Scenic Hudson petition. They also include the growing concern expressed by administrative agencies, including the Federal Power Commission, regarding their responsibilities under NEPA.

The said court conflicts and administrative agency concerns are the subjects of a number of current important studies and investigations. One study is presently being undertaken jointly by the United States Senate Commit-

tees on Interior and Insular Affairs and on Public Works, which held oversight hearings on March 6 and March 7, 1972. One of the principal witnesses was Mr. Roger C. Cramton, Chairman of the Administrative Conference of the United States. In his statement, Mr. Cramton discussed in detail most of the recent Court of Appeals and District Court decisions interpreting NEPA which are cited and discussed in the Scenic Hudson petition.

Mr. Cramton in his statement referred to, among other things, "Uncertainties In the Meaning and Application of NEPA", including the "Scope of NEPA" and the "Substantive Effects of NEPA". With respect to its substantive effect, Mr. Cramton stated:

> "One area of considerable uncertainty is how NEPA operates to affect the decisional equation in each agency. There is no question that NEPA requires decision-making procedures which will permit agencies to take environmental values into account. But what weight is to be given to such values where they conflict with the values expressed or implicit in the statute, the agency is administering? Section 105 of NEPA simply states that the policies and goals of NEPA are 'supplementary' to those set forth in the agencies' existing authorizations, a statement which provides little practical guidance."

At another point in his testimony, Mr. Cramton referred to "severe difficulties" which "Federal agencies appear to be encountering . . . in complying with NEPA as construed by reviewing courts."*

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* Petitioners disagree with many of the positions taken by Mr. Cramton, but cite and quote his comments to demonstrate the critical importance of a Supreme Court interpretation of NEPA.

Other witnesses at the said oversight hearings, each of whom testified about problems of the scope of the duties of administrative agencies under NEPA, were Russell E. Train, Chairman on the Council of Environmental Quality; William D. Ruckelshaus, Environmental Protection Agency Administrator; James R. Schlesinger, Chairman of the Atomic Energy Commission; John N. Nassikas, Chairman of the Federal Power Commission, and Rogers C. B. Morton, Secretary of the Interior. The testimony of each of the said high governmental officials pointedly demonstrates the need of a Supreme Court determination of the duties under NEPA of administrative agencies such as the Federal Power Commission.

Petitioners submit that grant of certiorari in this case, marking the beginning of the judicial response to increasing environmental degradation, the principal federal legislative response to which has been NEPA, would furnish the best opportunity for this Court to formulate some answers to the questions raised by Mr. Cramton and the other witnesses named above.

2. The Scenic Hudson petition describes a number of ways in which the Federal Power Commission failed to comply with the mandates of the National Environmental Policy Act, including its failures to consult with other agencies and to meet the requirements of Section 102(2)(C) regarding the detailed environmental impact statement. To these failures must be added one other—the failure to prepare the impact statement that could be subject to scrutiny *before* the Commission made its final decision.

The requirement that an impact statement be prepared *prior* to the final decision is clear from the last sentence of §102(2)(C) which mandates that the statement ". . . shall accompany the proposal [here the license application for the Storm King plant] through the existing agency re-

view processes." In this case, this requirement was not met. The Federal Power Commission instead left to its final order the development of a purported impact statement, by which time it was too late to subject the statement to the further scrutiny that NEPA contemplates.

Despite the clear language of Section 102(2)(C), the court below held that the Commission's final opinion, without more, was sufficient to meet the mandates of the Section. Three months later, however, in *Greene County Planning Board* v. *F.P.C.* (Docket Nos. 71-1991, 71-1996, 2nd Cir., Jan. 17, 1972), a different panel of the same court reached an opposite conclusion, holding that the Commission, through its staff, must prepare an impact statement that can be subject to scrutiny *before* a final decision is made. It is submitted that the conclusion of the *Greene County* panel is the correct one, and that the decision of the court below in this case is simply not consistent with the mandates of NEPA. In any event, given the diverse interpretations of the separate panels of the court below, and the importance of clarifying for all concerned the procedures that must be followed under NEPA, this Court should exercise its supervisory powers by reviewing this case and providing a definitive interpretation of the statute.

3. In his dissent from the denial by the court below of the several petitions for rehearing *en banc* in this case, Judge Timbers stated:

> "Aside from the fact that four of the eight active judges of this Court (including two members of the panel who heard and decided the case originally) have voted in favor of *en banc* reconsideration, it does seem to me that a substantial question of unusual importance is presented by the panel's application of the substantial evidence test in reviewing the

> FPC's determination that the benefits of the project outweigh the environmental damages." (453 F. 2d at 494).

This commentary cuts very much to the heart of this case. For throughout its opinion, the court below relied on a rigorous, mechanical application of the substantial evidence test to uphold the Power Commission's conclusions. In this connection, the court never took note of the fact that the expertise of the Commission does not extend to critical environmental matters, and, as a consequence, that the usual rationale for judicial deference to agency findings was not present in this case. Nor did the court below take cognizance of the heightened responsibilities for environmental protection that have been imposed on agencies by NEPA and that can only become a reality if rigorously enforced by the courts. See *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F. 2d 1109 (D.C. Cir., 1971).

Petitioners respectfully submit that if the substantial evidence test were permitted to be applied as the court below has applied it in this case, NEPA would be rendered meaningless. In these circumstances, the essentially unbounded discretion of administrative agencies, taken together with their historical priorities (e.g., power development in the case of the FPC), would mean that environmental protection would inevitably be relegated to a subordinate role. This is exactly what has happened in this case—and it confounds the whole purpose of NEPA. Such a result should not be permitted to stand.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

March 24, 1972.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

APR 26 1972

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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